

Supreme Court, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. **76-872**

BENJAMIN R. BURROUGHS,

Petitioner,

vs.

BOARD OF TRUSTEES OF THE PENSION TRUST FUND
FOR OPERATING ENGINEERS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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BENJAMIN R. BURROUGHS,
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BOARD OF TRUSTEES OF THE PENSION TRUST FUND
FOR OPERATING ENGINEERS, et al.,
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**PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit**

Petitioner Benjamin R. Burroughs respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in the above-entitled proceeding on October 4, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto, *infra* at pp.

i-viii. The opinion of the United States District Court for the Northern District of California is reported at 398 F.Supp. 168, and appears in Appendix B hereto, *infra* at pp. ix-xxvi.

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the United States District Courts have the power to award attorneys' fees, in actions under Section 302 of the Labor-Management Relations Act of 1947 (29 U.S.C. §186), where an employee-beneficiary of a union welfare fund has been successful in obtaining injunctive relief against a "structural" violation of that section by the trustees of the fund.

STATUTE INVOLVED

Section 302 of the Labor-Management Relations Act of 1947 (29 U.S.C. §186) is set forth in Appendix C hereto, *infra* at pp. xxvii-xxx.

STATEMENT OF THE CASE

Petitioner commenced an action for damages, injunctive and declaratory relief, under Section 302 of

the Labor-Management Relations Act of 1947 (29 U.S.C. §186), in the United States District Court for the Northern District of California on November 23, 1973 (C.R. 1).¹ His complaint alleged that the defendants, trustees of a jointly-administered employee pension fund established pursuant to Section 302(c)(5) (29 U.S.C. §186(c)(5)), had violated that section by wrongfully denying his application for a disability pension filed on October 31, 1972 (C.R. 1-14). Specifically, petitioner alleged that the defendant trustees had acted arbitrarily in denying his pension application pursuant to their "break-in-employment" rule, which operated to divest employee-beneficiaries of their accrued pension credits in the event that they failed to earn at least one quarter of such credit during a period of three years, and their "Social Security Disability Benefit" rule, which required that employee-beneficiaries establish their entitlement to a Social Security Disability Benefit as a prerequisite to receiving a disability pension from the Fund (See C.R. 116, 187).

Petitioner's action was tried by the District Court commencing on February 10, 1975, and on April 14, 1975, the District Court issued its Findings of Fact and Conclusions of Law (Appendix B, pp. ix-xxvi). The District Court found that the defendant trustees had acted on petitioner's pension application in a manner which was "arbitrary and capricious" and,

¹"C.R." references are to the Clerk's Record on Appeal which is on file in the Court of Appeals below. "R.T." references are to the Reporter's Transcript on Appeal, also on file in the Court of Appeals below.

therefore, in violation of their duty under Section 302(c)(5) (Appendix B, p. xxii).

The District Court's judgment was based upon its finding that the "break-in-employment" rule, as applied to petitioner, was "arbitrary and capricious under the circumstances, in that [petitioner] was not notified of the Rule until over two years after the Rule began operating to cut off his accrued pension rights." (Appendix B, p. xxii). Specifically, the District Court found that while the Rule was not formulated until the official execution of the trust agreement on December 30, 1959 (Appendix B, p. xi), and participants in the plan were not notified of its existence until on or about April 27, 1960 (Appendix B, p. xix), it had been applied *retroactively*, from January 1, 1958, the beginning date for employer contributions to the plan, to cut off the pension rights of those who earned insufficient amounts of pension credit in 1958, 1959, and 1960 (Appendix B, p. xviii). The District Court concluded that this application of the Rule was arbitrary and capricious, and thus in violation of Section 302(c)(5) of the Act, as well as the principles of law and equity, because:

"... since the Break-in-Employment rule by its terms allows a participant three years in which to accumulate the required minimum hours of contributory employment to remain a pension plan participant, plaintiff should have been allowed three years in which to accumulate said minimum hours from the date plaintiff was put on notice of the rule. Failure of the Board of

Trustees to allow plaintiff said three years from the date of notice was arbitrary and capricious in light of all of the circumstances . . ."

(Appendix B, p. xxii). It further concluded that the action of the defendant trustees in administering the trust "in a manner lacking in fundamental due process" was, within the meaning of Section 302, "tantamount to a basic structural defect in the trust" (Appendix B, pp. xxv-xxvi). The District Court reasoned that:

"As a practical matter, whether the unjust exclusion of a pensioner is obtained from the exclusive provision of the trust fund itself or from the arbitrary and exclusionary implementation procedures of trustees, the ultimate effect is that the trust is not operated for the 'sole and exclusive benefit of the employees.'"

(Appendix B, p. xxvi).

With respect to the "Social Security Disability Benefit" requirement, the District Court found that "although an applicant for a social security benefit must meet the test of being disabled and also must meet an earnings requirement, when the Board of Trustees adopted the social security disability test, its sole focus was on the disability aspect, not on the earnings requirement." (Appendix B, p. xiv. See also R.T. 98). Thus, it concluded that:

"To the extent the definition of total disability within the Pension Plan requires a participant to receive a social security disability award, or its equivalent, said requirement is unreasonable on its face and as applied to plaintiff in that the

earnings aspect of such an award was not intended to be a focus for determining eligibility for disability benefits under the Pension Plan.”

(Appendix B, p. xxii).

Accordingly, the District Court upheld petitioner's claim and granted him a permanent injunction compelling the defendant trustees to pay him disability pension benefits for so long as he remained eligible under the terms of the plan (Appendix B, pp. xxiii-xxiv). The District Court refused, however, to grant petitioner an award reimbursing him for the attorneys' fees he had expended in securing his pension (Appendix B, pp. xxiv-xxv. See also R.T. 177-178). Petitioner noticed a timely appeal from that portion of the District Court's judgment which denied him an award of attorneys' fees, and the defendant trustees then cross-appealed on the merits of the judgment (C.R. 230, 233).

On October 4, 1976, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court in all respects, holding that the action of the defendant trustees in denying petitioner a pension pursuant to its “break-in-employment” rule was “arbitrary and capricious” in the circumstances, and therefore in violation of Section 302 (see Appendix A, pp. v-vii), but that petitioner was not entitled to attorneys' fees under the “common fund or common benefit” doctrine reaffirmed by this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Thus, the Court of Appeals noted that “in this case, no records have been main-

tained [by defendant trustees] which would have revealed the number or identity of persons benefitted by Burroughs' action [and] the class of beneficiaries is thus of indeterminable size and not easily identifiable” (Appendix A, p. viii). In such circumstances, the Court of Appeals concluded, petitioner had failed to establish “a factor common to all . . . common benefit decisions” of this Court (Appendix A, p. viii).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in this case collides squarely with the decisions of this Court in a long line of cases culminating with *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Although the Court in *Alyeska* reaffirmed the long-established rule that “in the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser” (421 U.S. at 247); it also reaffirmed an equally well-established exception to the rule permitting an equity court to award attorneys' fees where the prevailing litigant has conferred a substantial benefit on an ascertainable class of persons, and the granting of fees from a common fund will operate to spread the costs of the litigation among such persons. (*Id.* at 257-258, citing *Trustees v. Greenough*, 105 U.S. 527 (1881); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); and *Hall v. Cole*, 412 U.S. 1 (1973)).

A review of the above-cited decisions of this Court shows that this "substantial benefit" exception has been considerably broadened over the years. In *Sprague v. Ticonic National Bank, supra*, the Court held that an award of attorneys' fees was proper even where the plaintiff had not sued on behalf of a class, so long as the *stare decisis* effect of the plaintiff's successful litigation operated as a practical matter to benefit others who were similarly situated (See 307 U.S. at 167). *Mills v. Electric Auto-Lite Co., supra*, further broadened the "substantial benefit" exception by holding that the benefit conferred need not be a monetary one. There, the plaintiffs were corporate shareholders who brought suit under the securities laws to set aside a corporate merger accomplished through the use of a false and misleading proxy statement (See 396 U.S. at 377). The Court concluded that their action had benefitted both the corporation and the other shareholders, justifying an award of attorneys' fees from the corporate treasury, even though the suit had not produced "a monetary recovery from which the fees could be paid . . ." (*Id.* at 392). Rejecting the contention that creation of a "common fund" was a prerequisite to the lower court's power to award fees, the Court held that "the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor" (*Id.* at 394). The rationale for such an award

is that the litigation "corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation" and that such "corporate therapeutics" justify the payment of fees from the corporate treasury (*Id.* at 396).

Similarly, *Hall v. Cole, supra*, approved an award of fees to a union member who had brought suit, under the "free speech" provisions of Section 102 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. §412), to vindicate his own right to criticize union policies. Although his action had conferred no financial benefit on the union or any of its members, an award of fees from the union treasury was held appropriate because the plaintiff, by vindicating his own statutory rights, "necessarily rendered a substantial service to his union and to all of its members" (412 U.S. at 8). Specifically, the Court found that such litigation operates to dispel the "chill" cast upon the free speech rights of other members, and thus "contribute[s] to the preservation of union democracy." (*Ibid.*). An award of fees from the union treasury in such circumstances "simply shifts the costs of the litigation to the class that has benefitted from them" (*Id.* at 8-9, citing *Mills, supra*).

Under the standards set forth in the above-cited decisions of this Court, an award of attorneys' fees was clearly appropriate in the circumstances of this case. Section 302(c)(5) of the Labor-Management Relations Act of 1947, under which petitioner brought suit, requires that the trustees of union welfare and pension funds administer such funds "for the sole

and exclusive benefit of the employees" (See 29 U.S.C. §186(c)(5)). This provision reflects a clear congressional intent to prevent misuse or mismanagement of fund assets, and to that end Congress has established "specific standards . . . to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for purposes for which they were established . . ." *Arroyo v. United States*, 359 U.S. 419, 426-427 (1959). See also *United States v. Ryan*, 350 U.S. 299 (1956). Moreover, Congress has assured "continuing compliance with these standards in the administration of welfare funds" by making the provisions of Section 302(c)(5) "explicitly enforceable in Federal District Courts by civil proceedings under §302(e)." *Arroyo v. United States, supra* (359 U.S. at 427).

An employee-beneficiary of a union welfare fund who is successful in obtaining judicial relief against a so-called "structural" violation of Section 302(c)(5), thus restoring the fund to its original, lawful purpose as intended by Congress, must by definition confer a substantial benefit on both the fund as an entity and on its employee-beneficiaries as a class. This benefit is directly analogous to the "corporate therapeutics" referred to in *Mills v. Electric Auto-Lite Co., supra*, and to the "preservation of union democracy" referred to in *Hall v. Cole, supra*. In each case, the litigation in question serves to implement an important congressional policy by correcting an institutional abuse, and in each case an award of fees from

the funds of the institution itself serves to spread the costs of the litigation among the benefitted class, whether they be corporate shareholders, union members, or pension fund beneficiaries. See *Mills, supra*, 396 U.S. at 396; and *Hall v. Cole, supra*, 412 U.S. at 9-10.² Nor is it determinative that the plaintiff's action does not increase or preserve the total assets of the entity involved, or bestow a direct financial benefit on each and every one of the persons with an interest therein. *Mills* holds unequivocally that a monetary benefit is not a prerequisite to an award of fees, and the holding in *Hall v. Cole* clearly confirms this point.

In this case, the courts below found that the pension fund in question had been administered by the defendant trustees in a manner which was "arbitrary and capricious" (Appendix A, p. v), and therefore in violation of the "sole and exclusive benefit" requirement of Section 302(c)(5), but concluded that petitioner was not entitled to an award reimbursing him for the attorneys' fees he had incurred in obtaining judicial relief against such violation. In so holding, the Court of Appeals below totally ignored the

²In *Hall v. Cole*, the Court cited with approval the decision of the Court of Appeals for the District of Columbia Circuit in *Yablonski v. United Mine Workers of America*, 466 F.2d. 424 (1972). There, the Court of Appeals expressly rejected the conclusion of the district court below that fees were inappropriate in a series of individual actions for injunctive relief under the LMRDA because "the Yablonski lawsuits did not benefit anyone except Yablonski." (*Id.* at 430). Noting that Congress' concern in passing the LMRDA had been focused on "the overriding importance to union democracy of free and fair elections", the court found that the litigation before it "contributed, both in the short and the long run, to the achievement of this objective" (*Ibid.*).

important non-economic benefit which petitioner's action conferred upon the fund as an entity and its beneficiaries as a class. Concerning itself exclusively with the financial benefit bestowed by petitioner's action upon other beneficiaries of the fund who were similarly situated with respect to the "break-in-employment" rule, the Court of Appeals based its decision on the fact that such persons could not be identified from the records of the fund. In such circumstances, it concluded, "no definite class of beneficiaries has been ascertained" and an award of fees was therefore impermissible. (See Appendix A, p. viii).

This decision is, we submit, totally irreconcilable with the decisions of this Court in *Sprague v. Ticonic National Bank*, *Mills v. Electric Auto-Lite Co.*, and *Hall v. Cole*, *supra*, all of which reject the rationale that fees can be awarded only where the plaintiff brings suit as the representative of a class. See also *Yablonski v. United Mine Workers*, *supra*, cited with approval by this Court in *Hall v. Cole*. It is similarly in conflict with this Court's decisions in *Mills* and *Hall v. Cole*, which hold unequivocally that a monetary benefit is not a prerequisite to an award of fees, and that litigation which corrects an institutional abuse, thus implementing an important congressional policy, by definition confers a "substantial benefit" on both the institution in question and all of the persons who have an interest in it. Certiorari should accordingly be granted to insure compliance by the lower courts with the decisions of this Court.

2. The decision below is in conflict with the decision of the Court of Appeals for the District of Columbia in *Kiser v. Huge*, 517 F.2d 1237 (1974), a case involving substantially the same question presented here. There, the plaintiffs were coal miners who had been denied pensions pursuant to the so-called "signatory-last-employment" rule of the United Mine Workers pension fund. They sued under Section 302, were successful in invalidating the rule and obtaining their pensions, and were ultimately granted a substantial award of attorneys' fees. *Kiser v. Miller*, 364 F.Supp. 1311 (D.C.D.C., 1973). Although their action neither increased nor preserved the assets of the fund as a whole, and the granting of pensions to them and to other beneficiaries who were similarly situated did not benefit the beneficiaries of the fund as a class, the district court justified the award of fees as follows:

"The Court realizes that in taxing the fund, the Fund beneficiaries are the ones who will actually bear the burden. In this instance the Court finds the imposition would neither be burdensome nor unjustified. The Court bases its findings on the facts that the award is a reasonable and modest one, and that the entire fund benefitted from this suit with the prevention of general fiduciary abuse and improvement of the institutional functioning of the fund as an entity."

On appeal, the Court of Appeals in *Kiser v. Huge*, *supra*, affirmed this award of fees as a proper application of the "substantial benefit" doctrine of *Mills*, *supra*. In so holding, it relied expressly upon "the

[district] court's finding that it is appropriate for the fund to bear the costs of plaintiffs' legal fees since 'the entire fund benefitted from this suit with the prevention of general fiduciary abuse and improvement of the institutional functioning of the fund as an entity.' " (517 F.2d at 1256-1257).

This decision is in clear conflict with that of the Court of Appeals below, and this Court should accordingly grant a writ of certiorari to resolve this conflict in authority on an important question of federal law.

3. The decision of the Court of Appeals presents an important question of federal labor policy which should be resolved by this Court. In *Hall v. Cole*, *supra*, an action under the LMRDA, this Court noted that:

"... not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own... An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it."

(412 U.S. at 13, quoting from 462 F.2d 780-781). Thus, the Court concluded that it was "simply untenable to assert that in establishing the bill of rights

under the act Congress intended to have those rights diminished by the unescapable fact that an aggrieved union member would be unable to finance litigation." (*Ibid.*).

This reasoning applies with equal or greater force in the context of Section 302. The typical plaintiff in litigation under that section will be a union member who is either disabled—as is the petitioner in this case—or whose earning capacity has been reduced by age. Such persons are even less able to bear the financial burdens of litigation than the active union members in *Hall v. Cole*, and, as in *Hall v. Cole*, the defendants in Section 302 litigation will have the virtually unlimited financial resources of the fund available to pay their own attorneys. The inevitable result of denying attorneys' fees to employee-beneficiaries who bring suit under Section 302 will be to discourage all such litigation, and thus permit the abuses prohibited by Congress to go uncorrected. The petitioner in this case, who was forced to expend several thousand dollars in attorneys' fees to obtain a pension he had been unlawfully denied, well illustrates this point. Congress could hardly have intended such a result.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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December 23, 1976.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

Benjamin R. Burroughs,
Plaintiff-Appellant,
vs.

Board of Trustees of the Pension Trust
Fund for Operating Engineers, et al.,
Defendants-Appellees.

No. 75-2897

Benjamin R. Burroughs,
Plaintiff-Cross-Appellee,
vs.

Board of Trustees of the Pension Trust
Fund for Operating Engineers, et al.,
Defendants-Cross-Appellants.

No. 75-3289

[October 4, 1976]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: WRIGHT and TRASK, Circuit Judges,
and WATERS,* District Judge.

WRIGHT, Circuit Judge:

This case involves two appeals. One is brought by
the Board of Trustees of the Pension Trust Fund

*Honorable Laughlin E. Waters, United States District Judge of
the Central District of California, sitting by designation.

for Operating Engineers [hereinafter Trustees] from a judgment of the district court holding that the Trustees acted arbitrarily and capriciously in applying retroactively a break-in-employment rule to plaintiff Burroughs so as to deny him pension benefits. Burroughs appeals from the district court's failure to award him attorneys' fees.

I. FACTS

The Pension Trust Fund for Operating Engineers was established pursuant to a collective bargaining agreement, dated May 20, 1957, between Local 3 of the International Union of Operating Engineers and the Associated General Contractors of California, Inc. The agreement provided that, commencing January 1, 1958, the employers covered thereby were to make contributions to the pension fund for each hour worked by covered employees.

Under the terms of the pension plan, "pension credit" was defined as the number of years of service to the industry accumulated and maintained for each covered employee. "Past service credit" was defined as periods of employment prior to an employee's contribution date, and "future service credit" referred to periods of employment on and after the employee's contribution date. The contribution date for a given employee was defined as either January 1, 1958, or such later date as the Trustees might fix for a particular bargaining group.

Burroughs had accumulated $15\frac{1}{4}$ years of past service credit before 1958. From 1958 to 1972 he acquired $1\frac{1}{2}$ years of future service credit. He suffered a totally disabling heart attack in 1972 and applied for a disability pension.

His application was rejected because, by failing to work at least 350 hours for a contributing employer during any of the years 1958-60, Burroughs had suffered a "break-in-employment" under the terms of the trust agreement. That cancelled all his past service credit and rendered him ineligible for a disability pension.

Alleging that he had not received notification of the break-in-employment rule until 1960, at which time it was retroactively applicable to January 1, 1958, Burroughs sued the Trustees for wrongful denial of pension rights in violation of § 302(c)(5) of the Labor Management Relations Act of 1947 [LMRA], 29 U.S.C. § 186(c)(5).

II. THE DISTRICT COURT'S DECISION

The district court indicated that the break-in-employment rule, when taken together with the provisions of the plan for the vesting of pension credits, was reasonable on its face and that its adoption by the Trustees was not arbitrary and capricious. It held, however, that the application of the rule to Burroughs at the end of 1960 was arbitrary and capricious because Burroughs was not notified of the

rule until more than two years after the rule was in effect, cutting off his accrued pension rights.

III.

SECTION 302(e) JURISDICTION

Section 302 of the LMRA in general forbids an employer to make monetary payments to any representative of its employees and forbids such representative to accept such payments. Section 302(c)(5) creates an exception for payments to an employee pension fund by stating that the general prohibitions of § 302 do not apply:

with respect to money or other thing of value paid to a trust fund established by such representative, for the *sole and exclusive benefit of the employees* of such employer, and their families and dependents

29 U.S.C. § 186(c)(5) (emphasis added).

Section 302(e) grants district courts jurisdiction to determine whether the provisions of a given retirement fund constitute a structural defect in violation of § 302(e)(5). Section 302(e) does not, however, confer general power to interfere with provisions of agreements freely entered into between unions and employers which regulate day-to-day administrative matters of pension coverage and eligibility. *Lugo v. Employees Retirement Fund*, 388 F. Supp. 1001 (D.C.N.Y. 1975).

A structural defect is present when a pension plan excludes a sizeable number of union members with no reasonable purpose behind their exclusion, thus

failing to satisfy the requirement that the fund shall be for the "sole and exclusive benefit" of all employees. *See Insley v. Joyce*, 330 F. Supp. 1228, 1233 (D.C. Ill. 1971).

In its conclusions of law the district court found that the failure of the Trustees to administer the trust in a manner consistent with fundamental due process was in substance tantamount to a basic structural defect and said:

[W]hether the unjust exclusion of a pensioner is obtained from the exclusive provisions of the trust fund itself or from the arbitrary and exclusionary implementation procedures of the trustees, the ultimate effect is that the trust is not operated for the "sole and exclusive benefit of the employees."

This finding is consistent with the law of this circuit. *See Alvarez v. Erickson*, 514 F.2d 156 (9th Cir.), *cert. denied* 423 U.S. 874 (1975).

IV.

ARBITRARY AND CAPRICIOUS ACTION

A break-in-employment rule is not by itself arbitrary and capricious, as the district court implicitly held. This court, as was the court in *Kosty v. Lewis*, 319 F.2d 744 (D.C. Cir. 1963), is not concerned with *what* the eligibility requirements for the pension are, but rather with *how* the changes in qualifications are made.

In *Kosty*, the plaintiff miner was already eligible for retirement and pension rights at the time the

pension eligibility requirement was changed without notice or grace period. As that court stated, the bounds of fundamental fairness were over-reached because of "the failure of the Trustees to accord any notice or period of grace which would have afforded some reasonable possibility for an employee like appellant to have elected to retire and take the pension available immediately prior to the change." *Id.* at 749.

Burroughs' pension had not vested when the negotiated pension plan went into effect, although it would have vested in 1966 had the break-in-employment *not* occurred. Pension rights need not be vested, however, prior to a change in qualification requirements before the change can be deemed arbitrary and capricious. In *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1971), plaintiff seaman had been denied a retirement pension because at the time the break-in-employment rule was implemented he had not reached retirement age, although he had completed his minimal employment requirement. This court found such action to be arbitrary and capricious.

As the teachings of *Kosty* and *Lee* thus indicate, it was fundamentally unfair for the Trustees to apply the break-in-employment rule to employees such as Burroughs who had no notice of its existence and hence no reasonable opportunity to protect themselves from its impact during the years to which it was retroactively applied. As the district court stated in its conclusions of law:

[S]ince the Break-in-Employment Rule by its terms allows a participant three years in which to accumulate the required minimum hours of contributory employment . . . plaintiff should have been allowed three years in which to accumulate said required minimum hours from the date plaintiff was put on notice of the Rule.

V.

ATTORNEYS' FEES

As emphasized in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), attorneys' fees are not ordinarily recoverable by the prevailing litigant in the absence of statutory authorization. Section 302 of the LMRA gives no such authorization. Under the historic equity jurisdiction of federal courts, however, some exceptions to the general rule have arisen: where a common fund or common benefit has been created by the prevailing litigant, *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall v. Cole*, 412 U.S. 1 (1973); where there has been bad faith by the losing party, *Vaughan v. Atkinson*, 369 U.S. 527 (1962); or where there has been willful violation of a court order, *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923).

Under the common fund exception, courts originally permitted a plaintiff to recover attorneys' fees when his action in bringing suit resulted in the recovery or establishment of a fund in which others had the right to share. In *Mills v. Electric Auto-Lite Co.*, *supra*, the Court expanded this doctrine hold-

ing that there was no need for the creation of an actual fund, as long as a "substantial benefit" of some kind had accrued to the enriched class and the court had "jurisdiction over an entity through which the contribution can be effected." *Alyeska, supra* at 276 (Marshall, J. dissenting). It is argued by appellant Burroughs that the common benefit rationale should apply here.

In this case, however, no definite class of beneficiaries has been ascertained. It is argued that any other beneficiary of the pension plan who incurred a break-in-employment prior to December 31, 1963, the end of the third full year after notification to the members of the existence of the break-in-employment rule, will be in a position to take advantage of the ruling here. The Supreme Court, however, has identified a factor common to all its common-benefit decisions which is not present. It stated:

In this Court's common-fund and common-benefit decisions, the class of beneficiaries was small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting.

421 U.S. at 265, n.39.

In this case, no records have been maintained which would have revealed the number or identity of persons benefitted by Burroughs' action. The class of beneficiaries is thus of indeterminable size and not easily identifiable. The decision of the district court is therefore affirmed.

Appendix B

United States District Court
Northern District of California

No. C-73-2080 WHO

Benjamin R. Burroughs,	} Plaintiff,
vs.	
Board of Trustees of the Pension Trust Fund for Operating Engineers, et al.,	
	Defendants.

[Filed Apr. 14, 1975]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case was tried to the Court sitting without a jury on February 10 and 20, 1975. The Court having received oral and documentary evidence introduced by the parties at trial, and having duly considered said evidence and the points of law and authorities cited in the trial briefs of the parties, and having heard all the arguments of counsel, and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Findings of Fact

1. This is a civil action under the Labor Management-Relations Act of 1947 for injunctive, declara-

tory and monetary relief. Jurisdiction is conferred by 29 U.S.C. §186(e) and 28 U.S.C. §§1331, 2201.

2. Plaintiff was born on August 30, 1911; he joined Local 3A of the International Union of Operating Engineers on August 7, 1943; he transferred to Local 3 of the International Union of Operating Engineers ("Local 3") on January 4, 1947; he maintained his membership in Local 3 from and after August 7, 1943.

3. On December 30, 1959, Local 3 and the predecessor in interest to the Associated General Contractors of California, Inc., executed the Trust Agreement, Pension Trust Fund for Operating Engineers.

4. By its terms the Trust Agreement, Appendix A thereto (together with all amendments and modifications to the Trust Agreement and Appendix A) and the applicable provisions of collective bargaining and other labor agreements with the Associated General Contractors of California, Inc. and other employers, form the Pension Plan of Local 3 ("the Pension Plan").

5. Under the terms of the Pension Plan, employers having collective bargaining agreements with Local 3 are referred to as "Individual Employers" or "Contributing Employers". Said Individual Employers are required to make payments to the Pension Trust Fund for Operating Engineers ("the Pension Fund") of sums of money measured by the number of hours worked by each employee of such Individual Employer for the purpose of providing retirement benefits and pensions for their employees and their beneficiaries.

6. As executed on December 30, 1959, the Trust Agreement (Article 1, Section 4) defined "Covered Employee" as any employee of a Contributing Employer whose work or work classification is covered by a Collective Bargaining Agreement. Subsequently that definition was modified by an undated First Amendment to the Trust Agreement, so as to include all full time paid officers, and all employees classified as representatives (regardless of grade), administrative staff specialists, dispatchers and accountants on which Local 3 paid into the Pension Fund on the same basis that Individual Employers covered by the Master Agreement between the predecessor of the Associated General Contractors of California, Inc., and Local 3 paid on their employees who were Covered Employees. Thereafter, on March 7, 1966, that definition was again modified (by the Third Amendment to the Trust Agreement), so as to include all employees of a Joint Apprenticeship Committee or Committee on which Local 3 is represented, and all employees of the Local 3 Credit Union on which the appropriate Joint Apprenticeship Committee or Credit Union or both pay into the Pension Fund on the same basis as Local 3 pays into the Pension Fund, excluding in the case of a Joint Apprenticeship Committee and the Credit Union those employees covered by a Labor Agreement with a Labor Organization.

7. The Pension Plan (Article A, Section 2, Second Revised Appendix A) defines "Pension Credit" as the years of service which are accumulated and maintained for Covered Employees in accordance with the Pension Plan. "Past Service Credit" is de-

defined as periods of employment prior to an employee's Contribution Date to the extent credited in accordance with the Pension Plan, while "Future Service Credit" means periods of employment on and after the employee's Contribution Date to the extent credited in accordance with the Pension Plan. The "Contribution Date" is defined as January 1, 1958, or such later date as may be fixed by the Board of Trustees for a particular Bargaining Group and is the date applicable to the Bargaining Group in which the Covered Employee was employed when the first contribution to the Pension Fund was made on his behalf.

8. Local 3 has, at all times relevant, negotiated and executed Labor Agreements with employers in the construction industry, in part with associations of contractor employers and in part with individual contractor employers (including joint ventures). Throughout this period, the number of Individual Employers or Contributing Employers defined in the Trust Agreement has expanded and the industries covered by labor agreements with Local 3 have likewise expanded. The assets of the Pension Fund have grown considerably and as of the date of trial total over \$100 million. Individual Employers having or covered by agreements with Local 3 include the members of the Associated General Contractors; General Contractors Association of Hawaii; Construction Equipment Dealers of Northern California; Steel Fabricators and Erectors Council of Northern California, Northern Nevada and Utah; California Con-

tractors Council; Utah Chapter of the Associated General Contractors; Pile Driving Contracting Association of Northern California, Northern Nevada and Utah; Nevada Chapter of the Associated General Contractors; Pacific Shipbuilding and Ship Repair Firms; Rock, Sand and Gravel Producers Association of Northern California; Dredging and Contractors Association of California, Nevada, Utah and Hawaii; Engineering and Grading Contractors Association; and other employer associations. These agreements establish, in pertinent part, a Covered Employee's bargaining group, rate of contribution to the Pension Fund ("Contribution Rate"), the effective date of contributions to the Pension Fund ("Contribution Date"), and a recognition clause, recognizing Local 3 as the exclusive collective bargaining agent of all employees covered by labor agreements and as outlined in the extensive job classifications listed therein.

9. At the time plaintiff applied for his pension, Article C, Section 7, Second Revised Appendix A, provided as follows:

"A Covered Employee shall be entitled to retire on a Disability Pension if he was or becomes totally disabled at a time when:

- a. He has attained at least age 50 but has not attained age 65 and has at least 10 years of Pension Credit without a break in employment as defined in Article D, Section 5; or
- b. he has not attained age 65 and has at least 15 years of Pension Credit, without a break in employment as defined in Article D, Section 5; and

- c. if he meets the requirements in Subsections a. or b. above, he has also received two quarters of Future Service Credit, unless he is totally disabled on or before the Contribution Date for the Bargaining Group in which he was employed at the time he became disabled.

10. At the time plaintiff applied for his pension, Article C, Section 9, Second Revised Appendix A, provided as follows:

"A Covered Employee shall be deemed totally disabled upon determination by the Social Security Administration or its equivalent that he is entitled to a Social Security Disability Benefit or its equivalent in connection with his Old Age Survivors and Disability Insurance Coverage or its equivalent. The Board may at any time, or from time to time, require evidence of continued entitlement to such Social Security Disability benefits or equivalent benefits."

11. Although an applicant for a social security benefit must meet the test of being disabled and also must meet an earnings requirement, when the Board of Trustees adopted the social security disability test, its sole focus was on the disability aspect, not on the earnings requirement.

12. On or about March 14, 1972, plaintiff suffered a myocardial infarction which rendered him totally disabled to perform his occupation as an employee of the construction industry.

13. The Social Security Administration deemed plaintiff totally disabled, but denied him a Social Se-

curity Disability Benefit for the sole reason that he had not met the Social Security earnings requirement.

14. The Pension Plan, in Article D, Section 5.a. provides as follows:

"a. General Rule. It shall be considered a break in employment and a Covered Employee's previously accumulated Pension Credit shall be cancelled if after the January 1 coinciding with or next following his Contribution Date he fails to earn one quarter of Future Service Credit in a period of three consecutive calendar years, unless such Covered Employee was permanently and totally disabled on or before January 1 of the year in which contributions commenced for the Bargaining Group in which he was employed at the time he became disabled."

This rule is known as the Break-in-Employment Rule.

15. At the time plaintiff applied for his pension, Article D, Section 6.a. read as follows:

"Under the circumstances described below, an Employee shall have his Pension Credits vested and the break rule set forth in Section 5 of this Article D shall not operate to deprive him of his previously accumulated Pension Credit.

(1) Beginning January 1, 1972, an Employee's Pension Credit is vested if he (a) has accumulated 25 years of Pension Credit or (b) is at least age 45 and has accumulated at least 10 years of Pension Credit.

(2) Between January 1, 1965 and January 1, 1972, an Employee's Pension Credit was vested if

he (a) had accumulated 25 years of Pension Credit or (b) was at least age 55 and had accumulated at least 10 years of Pension Credit.

(3) Before January 1, 1965, an Employee's Pension Credit was vested if he was at least age 55 and had accumulated at least 10 years of Pension Credit."

16. Under the terms of the Pension Plan, once a Covered Employee's pension credit vests, the Break-in-Employment Rule does not operate to deprive him of his previously accumulated pension credit.

17. Local 3 has maintained, and at all times pertinent to this litigation maintained, employment dispatch procedures for the dispatch of Local 3 members and others to jobs throughout Local 3's multi-stage territory and jurisdiction. The employment received by those dispatched from the hiring halls is subject to economic fluctuations, weather and other factors peculiar to the construction industry. An operating engineer may work for numerous employers during his working life. The duration of the jobs available may and does significantly fluctuate.

18. Between April 1, 1942, and December 31, 1957, plaintiff worked in the geographical jurisdiction of Local 3 on work of the type covered by labor agreements with Local 3. During this period he accumulated fifteen and one-fourth years of pension credit, all of which was past service credit.

19. Between January 1, 1958, and March 14, 1972, according to the records of the Pension Fund, plaintiff earned an additional one and one-half years of

pension credit so that at the time of his retirement he had accumulated a total of sixteen and three-fourths years of pension credit.

20. Between January 1, 1958, and March 14, 1972, plaintiff, with few exceptions, maintained himself available for employment by registering in the employment offices maintained by Local 3 and contacting said offices regularly. During said period of time he worked for numerous employers. He received dispatches to most of these and, when dispatches from Local 3 were not forthcoming, he sought employment on his own. Even in those instances when plaintiff was working for employers to whom he had not been dispatched, he generally maintained his registration for employment. His wife, during these periods, would remain at home so that she could notify plaintiff in the event telephone calls from Local 3 employment offices were forthcoming. They were not.

21. In order to improve his chances of being dispatched to employment, plaintiff at various times registered in employment offices outside the area of his residence, as well as within, and, in 1969, enrolled at Rancho Murietta, a training facility for operating engineers, in order to improve his skills and thus his chances of being dispatched to employment.

22. On October 31, 1972, plaintiff applied for a disability pension based upon his total disability within the construction industry; his application was received by the Board of Trustees on November 6, 1972; plaintiff was informed on May 3, 1973, that, although he did not appear to qualify for a pension,

his application would be presented to the Pension Approvals Committee for consideration; on May 17, 1973, the Pension Approvals Committee met and determined that plaintiff did not qualify for a pension on the grounds that he had incurred a break in employment at the end of calendar year 1960 and again at the end of calendar year 1968; on July 12, 1973, plaintiff appealed the decision of the Pension Approvals Committee to the Secretary of the Pension Trust Fund; plaintiff's appeal was heard before an Appeals Committee on August 13, 1973; thereafter, the Appeals Committee upheld the action of the Pension Approvals Committee.

23. As a result of the first break in employment, at the end of calendar year 1960, all of plaintiff's previously accumulated past service pension credits were cancelled pursuant to the terms of the Pension Plan.

24. Plaintiff's first break in employment was based on a finding that he had worked fewer than 350 hours for Contributing Employers in each year during the three-year period from January 1, 1958, to December 31, 1960. During 1958 plaintiff worked well over 350 hours, performing his normal function as an equipment operator, but his employer was not a Contributing Employer. During 1959 and 1960 plaintiff had brief jobs with Contributing Employers, received through the union dispatch office, but the number of hours worked on such jobs totaled less than 350 in each year. During this period plaintiff regularly reported to the union hall to seek work, and never re-

fused any job he received from the union dispatch office.

25. The first notification to the participants in the Pension Plan, including plaintiff, of the Break-in-Employment Rule was on or about April 27, 1960.

26. Had the Board of Trustees not applied the Break-in-Employment Rule to plaintiff at the end of 1960, plaintiff would have had his pension rights vested upon his attaining age 55 years on August 30, 1966. Having had his rights then vested, the Break-in-Employment Rule could not have cancelled plaintiff's previously accumulated pension credit.

27. As a result of the application of the Break-in-Employment Rule to plaintiff by the Board of Trustees, plaintiff has been denied a monthly pension benefit since November 1, 1972, the time he was first eligible for same.

28. Had plaintiff been granted a pension upon his application for same, he would have been able to enjoy the benefits conferred by the Pensioned Operating Engineers Health & Welfare Trust Fund.

29. As a result of plaintiff's being denied a disability pension, he was required to expend his own funds for medical care, a portion of which would have been covered by the Pensioned Operating Engineers Health & Welfare Trust Fund.

30. As a further result of plaintiff's being denied a pension, plaintiff was required to expend and did expend sums of money to purchase medical insurance to cover injuries and illnesses that would have been

covered by the Pensioned Operating Engineers Health & Welfare Trust Fund.

31. As a further result of plaintiff's being denied a pension, plaintiff was required to expend and did expend sums of money to hire attorneys to prosecute this action on his behalf.

32. Since the beginning of the Pension Fund, plaintiff has been a union member and worked as an operating engineer in the construction industry. He has worked over 3,000 hours for Contributing Employers, and contributions to the Pension Fund have been made by such employers on his behalf.

33. The Break-in-Employment Rule was included in the Pension Plan upon the recommendation of the actuaries for the Pension Plan. One of the actuarial assumptions upon which the Pension Plan was then based, and continues to be based, was the rate at which employees would withdraw from employment as operating engineers in the area covered by the Pension Plan. Among the persons who are actuarially assumed to have withdrawn from such employment are those who incur a break in employment under the Rule. Similar rules are included in many other comparable pension plans within the industry.

Conclusions of Law

1. This Court has jurisdiction under 29 U.S.C. §186 and 28 U.S.C. §§1331 and 2201 to review allegations relating to violations of the statutory requirements of Section 302(c)(5) of the Labor Management Relations Act (29 U.S.C. §186(c)(5)) under which

the Pension Fund was created. The scope of judicial review in this action is restricted to determining whether the action of the Board of Trustees of the Pension Fund was arbitrary or capricious. *Kosty v. Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963), *cert. den.* 375 U.S. 964 (1964); *Roark v. Lewis*, 401 F.2d 425, 427 (D.C. Cir. 1968).

2. The Board of Trustees of the Pension Fund is required by the Trust Agreement, by Section 302(c)(5) of the Labor Management Relations Act, and by principles of law and equity, to administer the trust and manage the funds and assets of the trust for the exclusive benefit of its participants and their beneficiaries.

3. The Board of Trustees of the Pension Fund is required by the Trust Agreement, by Section 302(c)(5) of the Labor Management Relations Act, and by principles of law and equity, to establish criteria for eligibility for benefits that are just and reasonable, and not arbitrary, restrictive, or which have as their purpose and effect the unnecessary exclusion of participants from eligibility for benefits.

4. Under the requirements of Section 302(c)(5) of the Labor Management Relations Act, the Break-in-Employment Rule, when taken together with the provisions for vesting of pension credits, is reasonable on its face, and its adoption by the Board of Trustees was not arbitrary or capricious.

5. Under the requirements of Section 302(c)(5) of the Labor Management Relations Act, and under principles of law and equity, application of the

Break-in-Employment Rule to plaintiff at the end of 1960 was arbitrary and capricious under the circumstances, in that plaintiff was not notified of the Rule until over two years after the Rule began operating to cut off his accrued pension rights. *Kosty v. Lewis, supra*.

6. Under the requirements of Section 302(c)(5) of the Labor Management Relations Act, and under principles of law and equity, since the Break-in-Employment Rule by its terms allows a participant three years in which to accumulate the required minimum hours of contributory employment to remain a Pension Plan participant, plaintiff should have been allowed three years in which to accumulate said required minimum hours from the date plaintiff was put on notice of the Rule. Failure of the Board of Trustees to allow plaintiff said three years from the date of notice was arbitrary and capricious in light of all of the circumstances of plaintiff's employment history, both before and after adoption of the Pension Plan. *Lavella v. Boyle*, 444 F.2d 910 (D.C. Cir. 1971), *cert. den.* 404 U.S. 850 (1971).

7. To the extent the definition of total disability within the Pension Plan requires a participant to receive a social security disability award, or its equivalent, said requirement is unreasonable on its face and as applied to plaintiff in that the earnings aspect of such an award was not intended to be a focus for determining eligibility for disability benefits under the Pension Plan.

8. As a direct and proximate result of the violations of Section 302 of the Labor Management Relations Act set forth hereinabove, plaintiff has been damaged in being denied a monthly pension benefit from November 1, 1972, to date, and is thus entitled to the sum of the monthly pension benefits denied him, together with interest on each said monthly pension benefit at the legal rate, from the due date of each payment to the date of judgment herein.

9. As a further direct and proximate result of the violations of Section 302 of the Labor Management Relations Act as set forth hereinabove, plaintiff is entitled to damages, plus interest, for those medical expenses that would have been covered by the Pensioned Operating Engineers Health & Welfare Trust Fund had plaintiff's pension not been unlawfully denied him, in an amount consistent with the terms of said Pensioned Operating Engineers Health & Welfare Trust Fund.

10. As a further direct and proximate result of the violations of Section 302 of the Labor Management Relations Act as set forth hereinabove, plaintiff is entitled to recover from defendant Board of Trustees the amount of money expended by plaintiff in purchasing medical insurance for himself and his wife, plus interest at the legal rate from date of each premium payment to the date of judgment herein.

11. As a further direct and proximate result of the violations of Section 302 of the Labor Management Relations Act as set forth hereinabove, plaintiff

is entitled to a permanent injunction requiring the Board of Trustees of the Pension Fund to pay to plaintiff each month a pension benefit consistent with the terms of the Pension Fund and for so long as plaintiff remains eligible for same under the terms of the Pension Plan.

It Is Hereby Ordered that plaintiff will prepare, serve and file a certificate of counsel regarding attorneys' fees and a judgment in accordance with the foregoing findings of fact and conclusions of law, in form approved by defendants, on or before April 25, 1975.

Dated: April 11, 1975.

/s/ William H. Orrick, Jr.
William H. Orrick, Jr.
United States District Judge

United States District Court
Northern District of California

No. C-73-2080 WHO

Benjamin R. Burroughs,	Plaintiff,
vs.	
Board of Trustees of the Pension Trust Fund for Operating Engineers, et al.,	Defendants.

[Filed Jul. 25, 1975]

AMENDMENTS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Good cause appearing,

It is Hereby Ordered that:

1. Finding of Fact No. 31 is deleted from the Court's findings.
2. The Court makes the following additional Conclusions of Law:

"1A. The Court has jurisdiction to review the Board of Trustee's administration of the trust fund as well as the specific terms of the trust plan. *Lugo v. Employees Retirement Fund of the Illum. Prod. Indus.*, 366 F.Supp. 99 (E.D. N.Y. 1973).

3A. A failure of the Board of Trustees to administer the trust in a manner lacking in fundamental due process is in substance tantamount

to a basic structural defect in the trust. As a practical matter, whether the unjust exclusion of a pensioner is obtained from the exclusive provisions of the trust fund itself or from the arbitrary and exclusionary implementation procedures of the trustees, the ultimate effect is that the trust is not operated for the 'sole and exclusive benefit of the employees'. *Lugo v. Employees Retirement Fund of the Illum. Prod. Indus., supra.*"

Dated: July 24, 1975.

/s/ William H. Orrick, Jr.
William H. Orrick, Jr.
United States District Judge

Appendix C

LABOR-MANAGEMENT RELATIONS ACT OF 1947, SECTION 302 (29 U.S.C. § 186)

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.

* * *

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of

employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents); *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employee, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee group deadlock on the ad-

ministration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and

dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

Supreme Court, U. S.

FILED

JAN 21 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1976

No. 76-872

BENJAMIN R. BURROUGHS,
Petitioner,

VS.

BOARD OF TRUSTEES OF THE PENSION TRUST FUND
, FOR OPERATING ENGINEERS, et al.,
Respondents.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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STATEMENT OF RESPONDENT'S POSITION

Respondent Board of Trustees of the Pension Trust Fund for Operating Engineers submits that Burroughs' case is of such importance that certiorari should be granted as to the questions presented in its cross-petition on file with this Court, Docket No. 76-872. It submits that certiorari should not be granted as to the question presented by Burroughs' petition herein since the question as to the award of an attorney's fee was correctly decided by the District

Court, whose decision was affirmed by the Court of Appeals. It submits further that if Burroughs' petition is granted, justice requires that the Board's cross-petition also be granted, since if Burroughs should not have prevailed on his claim to a pension, he is clearly not entitled to an award of an attorney's fee, even if Section 302 of the Labor-Management Relations Act authorizes such an award to a prevailing litigant in a proper case.

REASONS FOR DENYING THE WRIT AS TO THE ISSUE OF ATTORNEYS' FEES

The decision of the District Court, affirmed by the Court of Appeals, is consistent with the holding of this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975), for the following reasons:

1. Burroughs' case does not come within the common fund and common benefit exception to the American Rule disallowing attorneys' fees in the absence of express statutory provision therefor. That exception, as stated in Burroughs' petition (p. 7), permits "an equity court to award attorneys' fees where the prevailing litigant has conferred a substantial benefit on an ascertainable class of persons, and the granting of fees from a common fund will operate to spread the costs of the litigation among such persons." It is apparent from the facts of Burroughs' case, however, that the cost of any award to him of attorneys' fees could not be shifted to the beneficiaries of the decision in his favor.

In the respondent Board's cross-petition for certiorari we have shown that the District Court awarded Burroughs a pension of \$155 per month for life on the basis of total employer contributions of \$963.02 with respect to his work (cross-petition, p. 5). His accrued benefits under this award to date exceed \$7800 (cross-petition, p. 16). The beneficiaries of the decision in his favor, if they could be identified, would be those covered employees who failed to work 350 hours for contributing employers in any one of the years 1958, 1959 and 1960 and needed two additional years to meet this requirement, and those other employees, if any, who failed to work 5 years in creditable employment under the Social Security Act within a 10 year period. Any employer contributions with respect to such marginal workers, as in Burroughs' case, would be rapidly exhausted by benefits payable under the Pension Plan, and the full burden of any attorneys' fee award would fall upon those who suffered from the decision, namely, the operating engineers actively employed in their trade who averaged 1500 hours or more of contributory employment annually (cross-petition, p. 4) and who would have to bear a disproportionate share of the cost of past service credit given to Burroughs and other operating engineers with work records similar to his.

The decision in *Kiser v. Huge*, 517 F.2d 1237 (1974), cited by Burroughs in support of his petition (p. 13), was a decision of a panel of the Court of Appeals for the District of Columbia which was superseded by that Court on rehearing *en banc* as to

every issue except the award of attorneys' fees (*Pete v. United Mine Wkrs. of Am. Welf. & R.F. of 1950*, 517 F.2d 1275 (1975)). The majority of the panel which wrote the *Kiser* opinion held that miners with as little as **one** year of contributory service were entitled to pension benefits from the Mine Workers Fund (517 F.2d at pp. 1250, 1262). On rehearing, the Court sitting *en banc* held that the Trustees of the Fund acted reasonably in requiring a minimum of **five** years of contributory service as a condition of eligibility for benefits (517 F.2d at p. 1286). Thus, the miners benefitting from the decision had all "performed substantial contributory employment" (517 F.2d at p. 1287) and there was therefore "reason for confidence that the costs [of the attorneys' fee award] could indeed be shifted with some exactitude to those benefitting" (*Alyeska Pipeline Service Co. v. Wilderness Society, supra*, 95 S.Ct. at p. 1621, n. 39).

It should be noted, further, that the reasoning of the Court in the *Pete* case casts serious doubt upon Burroughs' claim that the decision in his favor improved the institutional functioning of the Operating Engineers Fund as an entity.

In *Johnson v. Botica*, 537 F.2d 930 (7th C.A. 1976) the Court followed the reasoning of the *Pete* case in holding that an applicant with 16 years past work credit was properly denied a disability pension for the reason that, due to his disability, he could not meet a contributory employment requirement of 500 hours within a two year period after the inception of the pension plan. The Court said (p. 936):

"The appellant's argument focuses little attention on the duty and responsibility of the Trustees to establish an actuarially sound formula upon which an employee will be entitled to a pension. **In formulating the eligibility requirements, the Trustees could not responsibly have declared that anyone or everyone was entitled to pension benefits, regardless of the amount of contributions made in their behalf.** In the present case, we are considering the propriety of the Trustees' action in denying an application based upon 239 hours of work for which approximately \$54.00 in contributions were made. **The Trustees had the responsibility to insure that pension benefits would be available to those who had more than a minimal amount of contributions made in their behalf.** The Plan had received no contributions based upon Johnson's prior years of service in the industry."¹

In *Johnson v. Botica*, the applicant had no opportunity due to his disability to meet the 500 hour contributory employment requirement of the pension plan. In Burroughs' case, on the other hand, Burroughs had an entire construction season after notice of the break-in-employment rule to meet the less stringent 350 hour contributory employment requirement of that rule. Hence the decision in Burroughs' favor is inconsistent with the institutional functioning requirements for pension funds expressed in *Pete* and *Johnson*.

2. In the regulation of private welfare and pension plans Congress has made "specific and explicit

¹Throughout this brief, emphasis is added unless otherwise noted.

provisions for the allowance of attorneys' fees" which negative any "roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted" (*Alyeska Pipeline Service Co. v. Wilderness Society, supra*, 95 S.Ct. at p. 1633).

When Congress first regulated such plans by Section 302 of the Labor-Management Relations Act, it not only did not provide for an allowance of attorneys' fees but it also carefully circumscribed the relief which a federal court could give under that statute.

In *Snider v. All State Administrators*, 481 F.2d 387 (5th C.A. 1973) *cert. den.* 415 U.S. 957, 94 S.Ct. 1484 (1974), the Court said (481 F.2d at p. 390):

"In actions brought under section 302(e), a district court is in nowise limited in how deeply it may inquire into the structure and the administration of a union welfare trust fund into which employers have made contributions since a detailed study may be necessary to determine whether or not violations of federal law have occurred which would necessitate injunctive relief. **However, the federal court's ultimate exercise of adjudicatory power under this section is limited to the prevention of future violations since the Congress, as architect of its jurisdictional gambit, has not chosen to empower it to require an accounting or similar noninjunctive relief.** *Blassie v. Kroger Company, supra*, 345 F.2d at 67; *Employing Plasterers Ass'n v. Journeymen Plasterers, supra*, 279 F.2d at 97."

The legislative history of federal regulation of collectively bargained pension plans, referred to in respondent's cross-petition at pages 12-15, demonstrates that Congress has followed a deliberate, discriminating and selective policy with regard to such regulation, including provision for the allowance of attorneys' fees.

Congress first provided for such an allowance in section 9(c) of the Welfare and Pension Plans Disclosure Act, 29 U.S.C. §308(c), which authorized the court in an action against a fund administrator for a failure or refusal to make a publication requested under the Act, "in its discretion . . . to allow a reasonable attorney's fee to be paid by the defendant." Thereafter, when it enacted the Employee Retirement Income Security Act (ERISA) in 1974, it provided in Section 502(g), 29 U.S.C. §1132(g), that:

"In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion **may** allow a reasonable attorney's fee and costs of action to **either** party."

This selective process is precisely the procedure which this Court had in mind when it said in *Alyeska* that (95 S.Ct. at p. 1627):

"Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. §1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal

litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."

ERISA became effective on January 1, 1975 and specified that provisions which include the provisions of Section 502(g), quoted *supra*, "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975" (Section 514(b)(1), 29 U.S.C. §1144(b)(1)). At the time Burroughs' claim arose, therefore, there was no federal statute authorizing an award of attorneys' fees in an action on the claim, and under the holding in the *Alyeska* case, the absence of such express authority precluded any such award.

See: *National Woodwork Mfrs. Ass'n v. N.L.R.B.* (1967) 386 U.S. 612, 640, 87 S.Ct. 1250, 1266.

The decision in *Pete v. United Mine Wkrs. of Am. Welf. & R.F. of 1950*, 517 F.2d 1275, 1289 (App. D.C. 1975), *supra*, provides no support for Burroughs' claim. That case was decided before the decision in the *Alyeska* case and the Court did not consider the impact of that authoritative ruling of this Court. Further, the courts of the District of Columbia have greater jurisdiction over the conduct of the trustees of collectively-bargained funds than federal courts sitting within States, "since the federal courts are the only courts in the District of Columbia" (*Cuff v.*

Gleason, 515 F.2d 127, 129 (2d C.A. 1975), and there was an independent ground in the *Pete* case for awarding attorneys' fees against the fund because of the trustees' "protracted discriminatory conduct and breach of fiduciary duty" (see *Pete v. United Mine Wkrs. of Am. Welf. & R.F. of 1950*, *supra*, at pp. 1292-1293). There was no similar finding in Burroughs' case and no evidence to support such a finding.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should deny the petition of Benjamin R. Burroughs for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit as to the question relating to an award of attorneys' fees presented by that petition. We respectfully submit, further, that if this Court grants the petition of Burroughs, it should also grant the cross-petition of the Board of Trustees of the Pension Trust Fund for Operating Engineers on file herein under Docket No. 76-872.

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